

Working Well Is The Best Strategy: Judges under Populism

VB verfassungsblog.de/working-well-is-the-best-strategy-judges-under-populism/

Juan F. Gonzalez Bertomeu Mi 3 Mai 2017

Mi 3 Mai
2017

Introduction: foes of all stripes

Let's start with this truism—no administration, populist or not, wants courts meddling with them and checking on their power. Administrations often react to what they see as hostile decisions made by courts. These reactions may take a form that is congenial with political deliberation—courts in a democracy *need* to be scrutinized and criticized—but sometimes reach beyond, particularly in contexts of relatively weak institutions. Within these contexts, it is anything but rare to observe an administration, even a non-populist one, trying to curb judicial institutions, particularly as the latter become more “aggressive” in its decisions against the former. As a matter of fact, an administration may usually have the upper hand. While its head-on or more sweeping attempts will likely fail in the presence of a vigorous political opposition or a vigilant society, there are myriad ways to undermine courts, some easier to monitor than others.

At the institutional level, the repertoire includes drastic measures such as the stripping of a court's jurisdiction, the expansion of a court's membership to pack it with acolytes, and the creation of a new body to control an old one, but also less sweeping ones such as budgetary decisions that may obstruct courts' ability to function effectively and the under-enforcement of decisions (some of these may also be adopted with more innocuous purposes). At the individual level, the list includes the impeachment of judges, again a drastic measure, and the pressure put on them at the edge of, or beyond, what a society considers the “normal” interplay of democratic institutions. The possibilities are many.¹⁾In a recent [Monkey Cage](#) post, Tom S. Clark and Jeffrey K. Staton analyze the likelihood of some of these measures taking place within the U.S. context.

Populism and courts

Therefore, what characterizes populist regimes' in their relation to courts is not necessarily their belligerent stance against the latter but, rather, their usually more direct confrontation with them when not under their control. A number of factors explain this difference of degree. Stable political parties in government will likely be still around after they leave office, so their cost-benefit calculations need to account for that. Anything they do to other parties while in power they may come to regret when in the opposition. In contrast, populist regimes are usually a reaction to traditional party politics.²⁾Jan-Werner Müller, *What is Populism?* (2016); Carlos de la Torre (ed.), *The Promise and Perils of Populism* (2015); Maria Paula Saffon and Juan F. González-Bertomeu, “Latin American Populism: An Admissible Trade-off between Procedural Democracy and Equality?” (forthcoming, Constellations). Their leaders tend not to belong to a party that has shared power with others in the past. Thus, there is no guarantee they will survive the leader, and there is no expectation that they will go on to play the competition game with other parties in the long-run, after they leave office. Consequently, the incentives to discount the future are very high.³⁾Id.

Populism's binary rhetoric also helps enlist sympathizers and muddy the waters in the battle against courts. Meddling judges are often painted as elitist or corrupt technocrats who are armed with the exact opposite ideology to that of the regime. (As is well-known, populism's ideological muscle is very flexible.) Since a populist regime claims to be the true embodiment of the people, judges confronting them do not just decide against the people; they *are* against the people.⁴⁾Id. Once judges are presented this way, the conclusion is straightforward—of course they have to be reined in. These strategies coexist with more traditional or less ostensibly confrontational ones, like seizing the opportunity offered by the existence of a real deficit (like a court's backlog) to create a new court and appoint partisan judges.

In 1946-7, Argentine President J. D. Perón impeached all the Supreme Court justices but one—who happened to be very close to the government—and subsequently appointed friendlier justices.⁵⁾In this entry I am not interested in evaluating Perón’s or the other populist leaders’ policies or statements apart from those I mention related to the judiciary. Certain types of populism might be more justified than others. See Saffon and González-Bertomeu. A few years later, a local governor, a close ally, said “the judges of the new Argentina are not just ordinary judges but judges who know how to interpret the principles of General Perón’s doctrine and will.”⁶⁾Juan José Sebrelli, *Los deseos imaginarios del peronismo*, Buenos Aires, Sudamericana, 1992 (my translation). He added, in a later speech: “One cannot conceive of a judge without identifying him with the absolute terms of pure justice: Perón and the people.”⁷⁾Id. Similar statements—or at least similar strategies—can be found from such other Latin American populist leaders as President Fujimori of Peru or, less successfully, President Uribe, from Colombia. Mind you, they can also be found from leftist populist leaders. In the context of a critique of the judicial investigation of several Latin American presidents, Ecuadorian President R. Correa [recently said](#) that “military dictatorships are not necessary anymore; now [the opposition to progressive governments] only need[s] submissive judges...”

Opportunity costs are part of the explanation as well; populist regimes advance against courts because they can. Since they typically rise to power as a result of a crisis of representative democracy, populist leaders often act against a background of weakened political oversight. They can also reap the fruits of another signature strategy—the attack on fact-based journalism. A confrontation with courts is less visible when the media are weak,⁸⁾Clark and Staton, id. and media reports are less credible when they share with courts a stain as the people’s enemy. “Of course the media are defending the courts—what would you expect from them?”

Two conditions

Courts and judges are indispensable institutions in a democracy. Yet, it just so happens that some courts do operate in an excessively arcane and opaque way. And, in some cases, they do turn their back on the people. Some of these traits are a function of the institutional design of courts, part of which is not in the hands of courts to decide. (In this entry, I largely discount the key issue of institutional design.) But, at the very least, courts can go some way toward changing them. While populism’s attacks may still be inescapable, courts can make sure they are ungrounded.

I present two conditions that courts should comply with. They are particularly pertinent, though not exclusive, to those courts whose task it is to adjudicate constitutional issues. In a way, both concern the need for courts to have a basis of support besides the judiciary’s inner corporate circle. Courts’ communication strategies are thus central. As commentators have noted, courts need the traditional media to ensure dissemination of attacks against them, and for the people to get to know their decisions and be able to monitor compliance with them.⁹⁾Jeffrey K. Staton, *Judicial Power and Strategic Communication in Mexico*. New York: Cambridge University Press, 2010. The traditional media weakened, courts need to be particularly savvy at finding new channels, but also careful to avoid over-exposition and being brought to the mud of political confrontation.¹⁰⁾Id. After briefly discussing these conditions, I reflect on what courts can do when facing an antagonistic administration.

No skeletons in the closet

Courts and judges serve an all-important, politically sensitive role protecting rights and checking on power. This role demands that they have “no skeletons in the closet.” This condition obviously strengthens any justification we can offer of courts’ role, but it can also weaken attacks against them. Judges serve a societal function; we want to defend them not because we believe they have an intrinsic right to their job but because that public function demands it.

The condition includes that judges are, and appear to be, independent from the undue influence of partisanship and interest in the decisions they make. It also demands that they conduct their business in a way that is transparent and, within natural boundaries, comprehensible, and that they are not perceived to be the members of a privileged

class of unaccountable officials, too far removed from the circumstances, needs, and values of the rest of society. In other words, as scholars often note, courts and judges need to be both independent and accountable. In many parts of the world, judges are still lacking in some of these respects.

Moreover, judges—and particularly those sitting in courts at the forefront of public discussion—should not carry a heavy baggage in terms of the decisions they have made in the past. As a rule, it is usually understood a judge cannot be impeached because of the content of her decisions. But a string of truly awful decisions, namely, that clearly go beyond what is considered acceptable within society or a legal community, blurs this rule's applicability. The impeachment of the justices under Perón illustrates this. The actual reason behind the impeachment was clearly to appoint a partisan Court, and the procedure was in many ways deficient. Yet, one of the central charges pushed forward by its proponents was fairly solid. The Court had upheld two military coups (first in 1930, and then again in 1943) in two declarations it had made clearly overstepping its jurisdiction. Perón had been either a sympathizer or a participant of these coups, but the Court's approval of them had not been any less real. It was a big skeleton to have; the untranslatable Colombian expression "*no dar papaya*" [one of whose meanings approaches something like "don't give obvious reasons or opportunities for others to take advantage of you"] is even more appropriate.

Social support

A sufficient number of people must come to sense courts are important—that their interventions make a difference in their lives, at least marginally. Well-functioning courts are *supposed* to achieve that outcome somehow. But, apart from this expectation, there is a strategic side involved, since people's positive experiences with courts can translate into public support for them.¹¹ Helmke, among others, has shown the importance of public support for courts. Helmke, Gretchen (2011). "Public Support and Judicial Crises in Latin America". 13 U. Pa. J. Const. L. 397. thus relatively shielding them from attacks.

This partly resonates with [Jorge González-Jácome's contribution](#). He labels the Colombian Constitutional Court's stance against President Uribe a *populist* one. I think the label is not appropriate, though the notion he defends very clearly is. Courts, at their best, can advance a project that is *popular* and, at their worst (if we believe in what some critics have to say), demagogical. Courts tend not to be *populist* in the sense that populist leaders are—i.e. seeking to mobilize the excluded, claiming a direct relationship with the people, and creating or emphasizing a divide between the regime's supporters and opponents.¹² Müller; de la Torre; Saffon and González-Bertomeu. They possess neither the incentives nor the means to do so. Yet, González-Jácome's insight is correct. Courts' ability to benefit at least a portion of society's members depends on a number of issues, some of them institutional—including their agenda-setting powers, their jurisdiction, the legal tools at their disposal, and the list of rights on a constitution. But, at least marginally, courts and judges can orient or reorient (part of) their work in that direction.

Fairly well-known examples include the Costa Rican Constitutional Chamber of the Supreme Court (the ultimate constitutional adjudicator in the country) and the Colombian Constitutional Court. As a result of these courts' multiple decisions on socioeconomic rights, equality, non-discrimination, and the rights of those subject to criminal investigation, among others, many in those countries do sense they make a difference.¹³ This does not mean that these courts have been strategic in their decisions, and, of course, it says nothing of the redistributive effects of these courts' decisions, the level of compliance with them, or their possible "demagogic" drive (an often-stated argument), all issues that need be, and are being, studied.

Between passivism and confrontation

Suppose a court was a fairly relevant and well-respected institution before a populist regime took power. What should it do now? Should it confront the regime head-on in cases of abuse, as in cases of clear constitutional violations?¹⁴ In Latin America, left-leaning populism has typically advanced an agenda that has included measures

against (some) corporations as well as other restrictions to property. I am not assuming that any such restriction implies in itself a violation of property rights. Should it instead take refuge in passivism? (Again, institutional design can nudge judges toward one or the other, but I am assuming this issue away.) In cases of ostensible constitutional violations, the former may be the option more clearly supported by the law. The court might even garner a degree of public support—apart from the support of NGOs or the bar—if its decisions and arguments become publicly known. It can also be a very risky route.

The latter (passivism) is perhaps easier for courts, but to the extent that it persists in the medium-run, it will deprive them from the support they can get from a share of society;¹⁵Helmke, Gretchen and Jeffrey K. Staton (2011). “The Puzzling Judicial Politics of Latin America”. In: Helmke and Ríos-Figueroa. *Courts in Latin America*, 306-331. they will also become, at best, irrelevant. Perhaps unsurprisingly, courts need be strategic and decide which battles to fight.¹⁶The literature on strategic theories of courts’ decision making is very extensive. A list on file with author. This, however, they should do without creating the perception that, in their calculations, they betray their role as defenders of the country’s constitution and laws. In case of doubt, legally-justified intervention may be more advisable than passivism. But the balance is always a fragile one,¹⁷Illustrations of the risks involved include Castagnola, Andrea and Aníbal Pérez-Liñán (2011). “Bolivia: The Rise (and Fall) of Judicial Review”. In: Helmke and Ríos-Figueroa. *Courts in Latin America*, 278-305. and all this is much easier said than done.

References [+]

1. ↑ In a recent [Monkey Cage](#) post, Tom S. Clark and Jeffrey K. Staton analyze the likelihood of some of these measures taking place within the U.S. context.

2. ↑ Jan-Werner Müller, *What is Populism?* (2016); Carlos de la Torre (ed.), *The Promise and Perils of Populism* (2015); Maria Paula Saffon and Juan F. González-Bertomeu, “Latin American Populism: An Admissible Trade-off between Procedural Democracy and Equality?”(forthcoming, Constellations).

- 3, ↑ Id.
4,
7.

5. ↑ In this entry I am not interested in evaluating Perón’s or the other populist leaders’ policies or statements apart from those I mention related to the judiciary. Certain types of populism might be more justified than others. See Saffon and González-Bertomeu.

6. ↑ Juan José Sebrelli, *Los deseos imaginarios del peronismo*, Buenos Aires, Sudamericana, 1992 (my translation).

8. ↑ Clark and Staton, id.

9. ↑ Jeffrey K. Staton, *Judicial Power and Strategic Communication in Mexico*. New York: Cambridge University Press, 2010.

10. ↑ Id.

11. ↑ Helmke, among others, has shown the importance of public support for courts. Helmke, Gretchen (2011). “Public Support and Judicial Crises in Latin America”. 13 U. Pa. J. Const. L. 397.

12. ↑ Müller; de la Torre; Saffon and González-Bertomeu.

13. ↑ This does not mean that these courts have been strategic in their decisions, and, of course, it says nothing of the redistributive effects of these courts’ decisions, the level of compliance with them, or their possible “demagogic” drive (an often-stated argument), all issues that need be, and are being, studied.

-
14. ↑ In Latin America, left-leaning populism has typically advanced an agenda that has included measures against (some) corporations as well as other restrictions to property. I am not assuming that any such restriction implies in itself a violation of property rights.
 15. ↑ Helmke, Gretchen and Jeffrey K. Staton (2011). "The Puzzling Judicial Politics of Latin America". In: Helmke and Ríos-Figueroa. *Courts in Latin America*, 306-331.
 16. ↑ The literature on strategic theories of courts' decision making is very extensive. A list on file with author.
 17. ↑ Illustrations of the risks involved include Castagnola, Andrea and Aníbal Pérez-Liñán (2011). "Bolivia: The Rise (and Fall) of Judicial Review". In: Helmke and Ríos-Figueroa. *Courts in Latin America*, 278-305.
-

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Gonzalez Bertomeu, Juan F.: *Working Well Is The Best Strategy: Judges under Populism*, *VerfBlog*, 2017/5/03, <http://verfassungsblog.de/working-well-is-the-best-strategy-judges-under-populism/>, DOI: <https://dx.doi.org/10.17176/20170503-174042>.